Supreme Court, U.S.
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92-517

NO._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HUBERT PAYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

WHETHER AN ACCUSED'S RIGHT OF CONFRONTATION AND THE HEARSAY RULE WERE VIOLATED WHEN INCRIMINATING EVIDENCE IN THE FORM OF STATEMENTS AND COMMENTS ATTRIBUTED TO THE ACCUSED BY A NON-TESTIFYING DECLARANT ARE SUBSTANTIVELY ADMITTED AS PROOF OF GUILT.

II

WHETHER DUE PROCESS WAS DENIED THE ACCUSED WHEN THE JURY WAS ALLOWED TO CONSIDER AN EXTENSIVE QUANTITY OF EVIDENCE, THE ADMISSION OF WHICH CANNOT BE SQUARED WITH THE REQUIREMENTS OF RULE 801(d)(2)(E).

III

EVEN ASSUMING CERTAIN INCONCLUSIVE DISCUSSIONS PARTICIPATED IN BY AN ACCUSED CAN BE SAID TO TRANSLATE INTO AN "AGREEMENT," DOES PROOF THAT A WITHDRAWAL OCCURRED BEFORE THE FIRST OVERT ACT CHARGED IN THE INDICTMENT WAS CONSUMMATED PROVIDE A COMPLETE DEFENSE TO TITLE

18 CONSPIRACY CHARGE.

IV

WHERE THE FACTS, AT LEAST ARGUABLY, SHOW THAT (AT MOST) THE "AGREEMENT" ELEMENT OF A TITLE 18 CONSPIRACY WAS REACHED ON A PARTICULAR DATE (HERE, MARCH 31, 1989) AND THE PROOF SHOWS ONE OF THE PARTIES TO SUCH "AGREEMENT" WITHDREW BEFORE THE NEXT "OVERT ACT" CHARGED IN THE INDICTMENT WAS ALLEGED TO HAVE OCCURRED (HERE APRIL 4, 1989), COULD THE EVIDENCE STILL BE SUFFICIENT TO SUPPORT A CONVICTION OF THE PERSON WHO WITHDREW.

V

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VI

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VIII

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable, The Chief Justice And
Associate Justices Of The
Supreme Court Of The United States:

The Petitioner, Hubert Payne, respectfully prays that a Writ

of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals, which judgment became final June 22, 1992 (Appendix "A") when a Petition for Rehearing *En Banc* (Appendix "B") was denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is set forth at Appendix "C" in the Appendix to this Petition. The Opinion is formally reported as **United States v. Hubert Payne, 962 F.2d 1228 (6th Cir. 1992).**

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the U.S. Court of Appeals was entered on May 5, 1992. The Order denying a Petition for Rehearing was entered on June 22, 1992. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254 (1).

Jurisdiction is also being invoked under favor of ***Rule 10.1(a), Rules of the Supreme Court***.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES:

1. Fifth Amendment, United States Constitution
2. Sixth Amendment, United States Constitution
3. 18 U.S.C. §371
4. 18 U.S.C. §1952
5. Rule 29, Federal Rules of Criminal Procedure
6. Rule 30, Federal Rules of Criminal Procedure
7. Rule 401 Federal Rules of Evidence
8. Rule 801(d)(2)(E) Federal Rules of Evidence

STATEMENT OF THE CASE

Hubert Payne, the petitioner herein, was charged in two counts of a multiple defendant, multiple count indictment. Of those indicted only Val King, Leonard Trem and the petitioner went to trial. Frank Coyle, Ralph Jones and Farris Williams all pled guilty to Count One, the Conspiracy charge.

At the trial of this cause Hubert Payne was acquitted on

Count Three, which substantively charged that on April 12, 1989, he and Val King laundered $25,000.00 in violation of 18 U.S.C., §1956(a)(3) and §2. He was convicted of the Title 18 Conspiracy charged in Count One. Val King, who likewise was convicted on Count One, the Conspiracy Charge, was also convicted of the substantive offense charged in Count Three. Leonard Trem was acquitted of the charges made against him.

The chief witness against our petitioner was one Frank J. Monaghan, a special agent of the IRS. His evidence was that his duties entailed being "in charge of narcotics, money laundering and undercover investigations" (Vol. I, pp. 72-73). This agent was allowed to testify that he had various recorded conversations with Frank Coyle, one of the co-defendants on the indictment who had pled guilty to the conspiracy charge made in the indictment. The first of the recorded conversations had by Monaghan with Coyle occurred on July 12, 1988 (id., 80). In opposing the playing of this tape, the argument was made that "the Government

[could]n't possibly be contending there was a conspiracy in existence on this date and that the conversation is in furtherance thereof" (id., 81). In responding that the Government indeed was so contending, interestingly this was said to be so because, as counsel opposite saw it, it was significant that Frank Coyle actually indicated during this conversation that "he had talked with Val King [mentioned him] in the past and that Val King had [reportedly said he had] associates who could launder money." (Id., 82.) And, that because this conversation occurred after what counsel opposite regarded as "the formation of a conspiracy between Frank Coyle and Val King" (ibid), this rendered the evidence admissible.

What distills from this particular taped conversation is that a plan was discussed whereby Monaghan could deliver cash to Frank Coyle who would give it "to Val King who, in turn, would turn it over to an attorney" (id., 94). The money would then be laundered by this attorney (ibid).

Our 801(d)(2)(E) objections to the playing of the taped conversations was made subject to a continuing objection by the Court (id., 104). The upshot of the facts emerging from this evidence is that it clearly shows the involvement of Coyle, Jones and Williams in a conspiracy to launder money.

Next, Monaghan testified he had an unrecorded conversation with Coyle on March 20, 1989. As to this, the jury was permitted to hear the following testimony:

> **Q.** Would you please tell the Jury the content of that conversation?
>
> **MR. WILLIS:** Objection.
>
> **THE COURT:** Overruled.
>
> **A.** Frank Coyle said ... that Val King and another individual who was a [pillar] of the community would take my money and handle it for me instead of the attorneys [i.e., Jones and Williams].
>
> * * *
>
> **Q.** Turning your attention now to March 23rd, do you recall coming back to

Cleveland, Ohio?

A. Yes. I met with Frank Coyle and Val King.

* * *

Q. ... can you briefly tell the Jury the topics that were discussed between yourself, Frank Coyle and Val King on that date?

A. ... [King] told me that he and his associate could handle my currency. However, they were going to charge me a 20-percent fee.

* * *

Q. And who did he identify as being his associate?

A. Hubert Payne.

Id., 137. (Emphasis supplied.)

Further, the Court even allowed this witness to tell the jury an agreement was reached between himself "and Val King on March 23, 1989."(Id., 144.) And, that the parties to the agreement were "Val King, Hubert Payne and Frank Coyle" (id.

145). Simply put, Monaghan was able to provide expert testimony that the agreement element required (for a Title 18 conspiracy) was fully satisfied, even as to Payne (who was not present), during this March 23, 1989 meeting.

The next testimony of significance, developed by the Government, centralized the meeting had at the Airport Sheraton Hotel at which Payne, King, Coyle and Monaghan were present. This meeting occurred on March 31, 1989. The recorded conversants were Hubert Payne (for the first and only time), Val King, Coyle and, of course, Monaghan (id., 149-150).

On cross-examination, Monaghan testified that inasmuch as his dealings with attorneys Jones and Williams had been a total "failure or disaster" (id., 298), the point had been reached where he "had no intention of letting them have more money" (id., 298).

The conversation Monaghan had (with Coyle and Val King) on the 23rd of March is also significant for other reasons as well. It is significant because Val King specifically informed Monaghan

(i.e., on March 23, 1989) that he would have to discuss Monaghan's proposition with someone else -- arguably, Hubert Payne (ibid). Thus, Monaghan's response to counsel's question makes it clear that he understood King and this other person would have to discuss his proposition before making any decision (id., 306-307). Simply stated, it was clear that Monaghan understood King and this other person would have to discuss his proposition before making any decision (id., 306-307).

This insuperable fact becomes most critical, if not dispositive, when considered in the light of Monaghan's further testimony that "quite often", in his experience, people in this business "throw other people's names [around] ... in order to lend the weight of their reputation to the venture" (id., 315). Simply put then, even though Monaghan voiced the opinion that King had entered into an agreement with him whereby "they [King and Payne] were going to handle ... [his] money" if and when he came to town (id., 317), Monaghan simply could not get away from the

plain meaning of some of his own words. These unambiguous comments showed that no agreement ever really crystallized.

The Record on this point is most clear. Indeed, Monaghan specifically admitted that when he stated "once we get all this going and organized [he] was talking about the future" (id., 319). As actually put by Monaghan, he was "talking about this $25,000 that ... [he] was going to give him (i.e., Val King) as well as some more money..." (id., 319). (Emphasis supplied.)

Having made this flat-out concession, the following testimony rendered by Agent Monaghan really makes our point. Here he testified:

> **Q.** So what was supposed to happen after that based on what you had been told earlier by King, that he and Payne would have to have a discussion to work out certain percentages and points, and this thing was to get organized in the future.
>
> You just got through saying that, didn't you?

A. During a couple hour discussion undercover, it is pretty hard to watch what you say, but, yes, I did say that.

* * *

Q. You were in charge of this meeting because you were the one who was filtering through the critical questions, correct?

A. I was asking the critical questions, correct.

* * *

Q. And you sort of had a script, you know, with the lead lines, and you were simply filling in these blanks in this role. You did a lot of ad libbing?

A. No. What happens is they tell you -- the agents in charge of the case tell you what they want accomplished and give you that broad, you know, outline, and that's it.

Q. Yes. You can do that with any actor. If he knows that pl[o]t, he can ad lib what goes in the middle, can't he?

A. Yes.

Id., 319-320 (Emphasis supplied.)

Frank Coyle, testifying as a Government witness, revealed that he had known Hubert Payne for twenty years and Val King for fifteen (id. 349). Coyle admitted to his knowing participation with Jones and Williams in a Money Laundering scheme with Monaghan.

Significant here, despite our objection to the admission against Payne of the considerable testimony showing the Jones-Williams' venture, the Government was able to emphasize (through Frank Coyle) the earlier testimony rendered by Agent Monaghan showing his own role in their illegal activities (id., 367 et. seq.). Here Coyle testified he discussed the need he had to "find somebody" (id., 377) with Val King and that King supposedly responded by telling him "he had somebody that said [they] could do it" (id., 378). The Court also allowed Coyle to testify, again over objections, that Val King then gave him Hubert

Payne's name (id., 379).

The next event of importance, testified to by Coyle, related to the March 23, 1989 meeting at the Bond Court Hotel in which those present were Coyle, King and Agent Monaghan (id., 380). According to Coyle, the sole purpose of this meeting was simply "to introduce Val [King] to ... [Monaghan] and to say he had a way of getting the money laundered a lot quicker and a lot cleaner" (id., 381). (Emphasis supplied.) Despite this stated purpose Coyle was permitted to give the jury his interpretation of a reference made on the taped version of this particular conversation. Id., 384-385.

Also, Coyle testified that when Val King mentioned Hubert Payne's name as a possibility, he questioned King about that and was told by King -- "Hubert's my friend. He will do anything for me" (id., 511). And, as to the meeting on March 31, 1989, Coyle testified he would analogize Payne's reference to "people ... who were involved in Money Laundering," to a businessman's

"puffing" (id., 513-514). In fact, Coyle's direct response was "that is [indeed] what it is called" (id., 514). This critical thought Coyle further punctuated by testifying that even he did not, and obviously could not, "know whether or not Mr. Payne was puffing ..." (id., 515).

Granted Coyle testified that on April 12, 1989, Payne delivered him the crucial $25,000 check (Exhibits 45T and 39), that was washed by Coyle through the Putnam account (id., 407). However, Frank Coyle readily admitted to the incontrovertible fact that we only have his "word" this is what happened (id., 524), which is what he obviously had to say. Because this is so, it is being emphasized that in his original statements to the agents, following his plea bargain and conversion into an essential witness for the Government, Coyle concedes that he told the Government Hubert Payne was driving his Jaguar (which Payne did not own or have on this critical date), when Payne assertedly gave him the $25,000.00 check "in front of [Coyle's] building" (id., 517-518).

Despite this testimony, the Government rather cleverly made an all out effort to get Coyle to retreat from the identification of the car as a Jaguar. Still it seems clear enough (from various segments of the Record) that Coyle was intentionally manipulated by Agent Rasoletti. (Tr., 518-522 & 734.)

Still another point was well made, for us, when Frank Coyle conceded that when he first told the agent Payne gave him the check he was indeed trying to curry the favor of the Government in hopes his own problems "would go away" (id., 523.) Coyle also admitted it came to him as "a major surprise" that Monaghan, after having expressed extreme dissatisfaction with Jones and Williams, continued to deal with them "behind ... [his] back" (id., 524).

The upshot of this latter point is that it truly exposes the wrong done Hubert Payne by the admission of evidence of Monaghan's dealing with Jones and Williams both before March 31, 1989 and after that date.

II

In addition to an array of character witnesses, Hubert Payne testified. Payne's evidence was designed to show that he did indeed accompany Val King to the meeting at the Airport Sheraton Hotel (Id., 828). His explanation for going to this meeting was simply stated: "[Val King] told me he had met[1] a contact of Frank Coyle and [Val] wanted me to meet him; that he wanted me to evaluate a situation regarding that contact."

Payne indicated his purpose in mentioning such things as investment gems and the like was "to facilitate the conversation, to move the conversation along, to see, try to find out what it was that Monaghan wanted" (id., 830). And, that he was really "storytelling" (id., 832). On this point, Payne then testified that when he left the Hotel with King that: "I told ... [King] that I didn't like the deal and that I didn't want any part of it and that I

---

[1] *Clearly this was a reference to the meeting Val King had with Agent Monaghan and Coyle on March 23, 1989 at the Bond Court Hotel.*

would talk to him a bit more in-depth the next day." Continuing, Payne testified:

* * *

Q. Now, prior to going to the hotel, had you heard the word "cocaine" or "drugs"?

A. No.

Q. And when was it that you first learned that cocaine or drugs was in some way involved in whatever the business venture was supposed to be?

A. When Mr. Monaghan mentioned it.

Q. At that point, what did you do?

A. I continued with the conversation, and I made a number of statements relative to that conversation.

Q. It was after you left the hotel that you and Mr. King were alone in the car, that's when you expressed your dissatisfaction; am I correct?

A. Yes, sir.

(Tr., Vol. III, pp. 834-837.) (Emphasis supplied.)

Payne's cross-examination showed him seriously diffusing the idea that as a businessman he would have thoroughly versed himself as to the purpose of the meeting at the Sheraton Hotel rather than "just fly by the seat of [his] ... pants" (id., 857) as he says he did here. This, of course, lends serious substance to Payne's unchallenged denial that he had any prior knowledge from Val King that Monaghan "was a [reputed] drug dealer" (id., 858).

To this end, Payne emphasized that once it became clear to him Monaghan was claiming to be a drug dealer, he (Payne) simply "played the scenario out" (id., 862). And, that in doing so he "was making it up as he went along" (id., 863).

These points are well made when one considers the fact that even Monaghan made reference to doing basically the same thing -- that is, acting out a scenario. The following segment of Payne's redirect examination makes this precise point:

> **Q.** Mr. Payne, several times in responding to questions put by Mr. Bakeman you indicated that you were acting out the scenario that had been

established?

A. Yes.

Q. Now, it is true, isn't it, that a number of times Mr. Monaghan made reference to the fact that "We are bullshitting" or, "We are just talking"?

A. Yes, he did.

Q. What did you understand him to mean when he said, "Well, we are just talking or bullshitting"? What did you understand him to mean?

A. That there was no commitment or anything firm; that we were talking about possibilities of things that could be done.

Q. And when you left that meeting, it was your understanding, wasn't it, that you would get back in touch with Mr. Monaghan or Mr. Coyle?

* * *

A. It was my impression that Mr. Monaghan or perhaps Mr. Coyle might contact either Val or me.

Q. And was it before Monaghan or

Coyle contacted you or Val that you told Val you didn't want anything to do with this proposition?

A. I told him that when we left the meeting, and I reinforced that the next day.

(Tr., Vol. III, pp. 900-901.)

III

At the close of all the evidence, the petitioner again moved for the exclusion of "all the conversation and the like involving Messrs. Jones and Williams" (Vol. III, 917). Additionally, counsel argued that even if it can be said there was an agreement made on the 31st of March, it was still our position that a mere agreement would not be enough. Further, it was specifically maintained that "what it requires is for a conspiracy to come into being is an agreement plus an overt act" (id., 921).

Here counsel argued a predicate for the admission of testimony as to events and occurrences that took place prior to March 31, 1989 must be present. This was said to be so because

of "the transactions that initially existed between Frank Coyle and [Agent] Monaghan as it developed [through] Jones and Williams and then developed through Val King and then Hubert Payne, the agreement has always been consistent" (id., 925). Having said that, counsel then contended that Payne's involvement was merely "a continuation of the same agreement, that is, to launder the money for Frank Monaghan" (id., 926).

Simply put, the Government's theory at that time was there was just "one conspiracy" (id., 926), that Payne was a member of that conspiracy and the assailed statements were "in furtherance of and in the course of the conspiracy ... [that had its inception] on July 12, 1988 and completed ... on or about April 21st, 1989 ... [hence] clearly all the statements were made during the course of the conspiracy" (id., 927).

First, as to the 801(d)(2)(E) objection, it was summarily overruled by the Court. Having done that, the Court then issued a query as to whether the Government had offered evidence of two

(2) conspiracies and if so what would be its effect. Responding to this, in support of his Motion for Judgment of Acquittal, counsel then argued:

> **[MR. WILLIS]** ... I am contending that the evidence is insufficient to support a finding that he was a party to the first branch of what I regard as the multiple conspiracies alleged in the indictment or, at least, as demonstrated by the evidence, because there is absolutely nothing that ties him into Jones and Williams.
>
> ... [L]et's assume that an agreement was reached. Certainly, a conspiracy requires more than an agreement.
>
> It requires an act in furtherance, an overt act in furtherance of that and ... it has to be one alleged in the indictment.
>
> The one that is alleged in the indictment is April 4th. Inasmuch as the defendant has offered some evidence that he withdrew, the Government has the burden of proving that he did, in fact, not withdraw. The Government has

> offered no such evidence.
>
> So for that reason, your Honor, I feel that the defendant is entitled to a judgment of acquittal, and we ask that the Court make that ruling.

(Tr., Vol. III, pp. 945-946 & 955-956.) (Emphasis supplied.)

Of critical importance here, in what is clearly a totally different position to that originally taken in his successful effort to overcome our 801(d)(2)(E) objections (Tr., 927-928), counsel opposite argued to the jury that:

> **[MR. BAKEMAN]** Now, what in this particular case is the evidence of the agreement? Again, I am drawing your attention to the time period following a telephone call received by Frank Coyle ... where Val King suggested to Frank Coyle that he had some other persons, particularly Hubert Payne, who were interested in laundering money.
>
> ... [O]n March 23rd, 1989 that Frank Monaghan in an undercover capacity met with Frank Coyle and Val King at the Bond Court.
>
> Was there an agreement reached at this meeting? I suggest to you, ladies and gentlemen, that absolutely the evidence showed that an agreement was reached to launder the drug dealer's money.

Specifically you heard on the tape, ladies and gentlemen, where King told the person who he believed to be a drug dealer ... that Payne [who was not at this meeting] can launder the money for a 20 percent fee.... And that's essentially the agreement.

Now, who were the members? Who had joined in on this agreement as of March 23rd, 1989?

Again, I suggest that the evidence shows beyond a reasonable doubt that who had entered into that agreement is Hubert Payne, Val King and Frank Coyle; that all three names were mentioned in that conversation; that Val King specifically said he talked to Hubert Payne. He specifically said what Hubert Payne had agreed to do.

So as of March 23rd, 1989, there was an agreement and there were three participants, Coyle, King and Payne.[2]

Now, ladies and gentlemen, what acts were committed, if any, in furtherance of this agreement? The first overt act was that a decision was made to meet with Hubert Payne ... In that meeting Hubert Payne outlined exactly how the money laundering

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[2] *A point of critical significance as to this contention, which was adopted by the Court of Appeals is that Monaghan indicated the only agreement reached at this March 23 meeting with King was that they would have a future meeting with Payne present (Vol. I, p. 144).*

was to take place....

> What else did Hubert Payne do in furtherance of this conspiracy? On ... March 31st, 1989, at the Sheraton Hopkins? He gave his business card to this person who posed as a drug dealer. That is an act in furtherance of the conspiracy.

(**Closing Arguments**, at Tr., Vol. II, pp. 1046-1048.)

IV

Next, the Record here shows the Court rejected our specific request (Rule 30, Federal Rules of Criminal Procedure) that the Court instruct the jury that where "there is some evidence on the issue of withdrawal, then the Government has to disprove withdrawal beyond a reasonable doubt ..." (Vol, III, p. 1005). (Also see id., p. 1162.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

What seems clearly to be the case here is that it can hardly be contended that Val King could make Hubert Payne a member of a conspiracy simply by saying to, either, Coyle and/or Monaghan (the Federal Agent) that Hubert Payne could be

interested (or was interested) in their money laundering ventures. This follows because of the absence of proof showing Hubert Payne had indeed entered into a conspiratorial relationship with King (or Coyle) and that Val King's statement (that he was interested) was made in furtherance of that relationship.

In this case, the point was made that even if we fully concede that the government proved that on March 31, 1989 Hubert Payne actually engaged in a conversation, which could have ended up in some sort of an agreement, this conversation itself could not possibly make for the charged conspiracy. However, these preliminary discussions are more aptly viewed, or regarded, as naked assertions which fail to impose criminal liability on Hubert Payne. This follows because clearly one cannot be found to have conspired with another, simply because the statements made by some other person suggests such may have been the case. This conclusion is a necessary consequence of the fact that one can only be convicted on the basis of their own acts

or declarations and not on the basis of the statements of others.

Here, too, we are submitting the contention that any reasonable juror would have to conclude that Coyle was not credible. This fact even counsel opposite apparently believed since he shifted from relying on Coyle's evidence as being a force in the government's proof. This conclusion surfaces from a study of counsel opposite's summations to the jury.

With reference to various factual findings made by the Court of Appeals, this Court hopefully will credit the ten (10) major flaws in the Court's recitation of the "facts" that were isolated. These flaws are specifically set forth in the Petition for Rehearing, Appendix "B", to this Petition, at pages A-7 - A-10. Given counsel-opposite's obligation to insure that any Opinion worthy of being reviewed should not contain easily corrected mis-statements, it is hoped counsel will agree with our characterization of these particular findings as being flawed and indefensible.

I. AN ACCUSED'S RIGHT OF CONFRONTATION AND THE

HEARSAY RULE ARE VIOLATED WHEN INCRIMINATING EVIDENCE IN THE FORM OF STATEMENTS AND COMMENTS ATTRIBUTED TO THE ACCUSED BY A NON-TESTIFYING DECLARANT ARE SUBSTANTIVELY ADMITTED AS PROOF OF GUILT.

What seems clearly to be the case here is that arguably it can be said that Frank Coyle and Val King were co-conspirators, or that they were (after Jones and Williams were eliminated by Monaghan) engaged in a conspiracy to attempt to locate someone to "launder" what was believed by them to be Monaghan's drug money. Still, it can hardly be contended that Val King could make Hubert Payne a member thereof simply by saying, to either, Frank Coyle and/or Monaghan (the federal agent) that Hubert Payne could be interested (or was interested) in working with them. This follows because of the absence of proof showing Val King and Hubert Payne had indeed entered into a conspiratorial relationship and that Val King's statement was made in furtherance of that relationship.

Our point in this regard flows from the following insuperable analysis. Under Rule 801(d)(2)(E), the requirements that must be met for statements of the type here being assailed to be admitted include the requirement that both the declarant (here, Val King) and the defendant (here, Hubert Payne) must be members of the conspiracy. The law still regards the membership requirement, as well as other factors, as elements that must be established by the preponderance of the evidence. **Bourjaily v. United States, 488 U.S. 171, 175 (1987).**

In our judgment the Government failed to show that a conspiracy existed that included Val King and Hubert Payne when the conversations between Val King, Coyle and Monaghan took place and Hubert Payne's name was inserted into these conversations by Val King. The conversations being referred to took place on March 23, 1989 and before. (This same analysis applies as well to all testimony related to the Jones-Williams aspects of the charged conspiracy.)

In a nutshell, what we are talking about here is the fact that statements and comments incriminating Hubert Payne (that were attributed to Val King, who did not testify -- and consequently could not be cross-examined) were admitted against Hubert Payne as proof of the matter asserted. The same is true with reference to statements made by Val King on March 23, 1989. In our judgment, statements of this type invariably, as was the case with the various statements here being assailed, prejudice any non-declarant co-defendant. In this case, Hubert Payne fits this description. Thus it should suffice to note that even if limiting instructions had been given (which, of course, did not happen) the resulting prejudice could not possibly have been eliminated. See **Bruton v. United States, 391 U.S. 123, 126 (1968)** and **United States v. Basey, 816 F.2d 980, 1004 (5th Cir. 1987).**

Now we do concede that the government proved that Hubert Payne on March 31, 1989, readily engaged in conversations which arguably can be interpreted as being a prelude

to some sort of criminal venture. The earlier conversations in which Val King and Frank Coyle inserted Payne's name into conversations they were having with Agent Monaghan are more aptly viewed, or regarded as naked assertions which could only incriminate the spokesman. This follows because clearly one cannot be found to have conspired with another, simply because the statements made by this other person suggests such may well have been the case. This conclusion is a necessary consequence of the fact that one can only be convicted on the basis of their own acts or declarations and not on the basis of the statements of others.

With reference to the various hearsay statements here being assailed, it is undeniable they were admitted as proof of the matters asserted (Rule 801[C]). On the other hand, the most that can be said for these various statements is that they are more easily viewed as simply being narrative declarations which are inadmissible.

Another point to be made here recognizes that if it is the law that any statement made by one shown to be a conspirator is automatically admissible, then the central requirement of Rule 801(d)(2)(E) -- that the statement must also be in furtherance of the conspiracy -- would lack any legal significance. And, to be admissible, all the prosecution would be required to show is that a particular statement was made by a co-conspirator and it could automatically be considered against all persons claimed by the government to be members. Indeed, this appears to have been what occurred here. For our trial Court simply credited the fact of her determination that a conspiracy existed as providing a sufficient basis for the retroactive validation of the admission of everything that was said on the tapes and otherwise by Coyle and King to Monaghan about Payne.

Under the theory of exclusion here being contended for, Val King's own admission of culpability and Val King's assertions as to the willingness of Hubert Payne to engage in criminal

conduct can only be regarded as inadmissible. See **United States v. Doerr, 886 F.2d 944, 951-952 (7th Cir. 1989)** and **Garlington v. O'Leary, 879 F.2d 277, 283-284 (7th Cir. 1989)**. Also see, **United States v. Paone, 782 F.2d 386 (2d Cir. 1986)** and **United States v. Eubanks, 591 F.2d 513, 520 (9th Cir. 1979)**.

Of significance here, we are indeed contending that even if one assumes a conspiratorial relationship was established as between Coyle and King, on or before March 23, 1989, this finding simply would not automatically justify the admission of any and all statements and comments made by Val King to Coyle and Monaghan about Hubert Payne. Because the petitioner's "substantial rights" were adversely affected by the admissibility of this evidence, surely the magnitude of any error related thereto required a reversal.

Further, the Court will surely recognize that the co-conspirator exception to the hearsay rule, although not actually an exception because of the wording in Rule 801(d)(2)(E), relates to

issues that are distinct from the crime of conspiracy. Significant, too, is the fact that **Bourjaily v. United States, 483 U.S. 171 (1987)**, left open a critical question as to whether a trial court can make the required determination solely on the basis of what would otherwise be inadmissible hearsay. Id., at 181. Also, **Bourjaily** simply did not eliminate the requirement that the conspiracy required by 801(d)(2)(E) must still be shown to exist by a preponderance of the evidence. See **United States v. Mack, 837 F.2d 254 (6th Cir. 1988)** and **United States v. Pinto, 838 F.2d 426 (10th Cir. 1988)**.

Based on these insuperable tenets, we fully contend the admission of the assailed evidence (*e.g.*, Ante, pp. 6-7) cannot be squared with the critical holdings made in **Bourjaily**. See **United States v. Silverman, 861 F.2d 571, 576-577 (9th Cir. 1988)**. Another cogent point, made most clear in **Bourjaily**, is the cogent holding that 801(d)(2)(E) statements must be regarded as being presumptively unreliable. Id., 483 U.S., at 179.

Simply put, the exact holding to which reference is made was that all "out-of-court statements are presumed [to be] unreliable." Id., 179. This "unreliable" characterization was especially deemed critical by the Ninth Circuit in **Silverman, id., 861 F.2d, at 578**. Silverman also makes a further point that, in our judgment, truly must be reckoned with. Here the Ninth Circuit, in commenting on **Bourjaily**, expressly emphasized the idea that a presumptively unreliable statement would "standing alone" be an insufficient predicate for the admission of **801(d)(2)(E)** evidence. (Ibid.)

II. DUE PROCESS IS DENIED AN ACCUSED IN THE WAKE OF THE JURY'S CONSIDERATION OF AN EXTENSIVE QUANTITY OF EVIDENCE, THE ADMISSION OF WHICH CANNOT BE SQUARED WITH THE REQUIREMENTS OF RULE 801(d)(2)(E).

Because (as argued above) the Sixth Amendment's confrontation clause and the Hearsay Rule were not accommodated by the admission of the considerable testimony showing hearsay statements and comments by Val King that tended to incriminate

Hubert Payne, a new trial is required for this reason alone. Regardless of how it is phrased, the dispositive query here is: whether there existed as between Val King and Payne a conspiracy to launder money as charged in this indictment. Clearly, if the evidence in the Record failed to sufficiently establish that they were conspirators when Val King made the statements here being centralized, their admission cannot be ratified.

Now we readily admit that despite counsel's very best efforts, rendered as counsel for William Bourjaily, this Court in our judgment decreed that hearsay can in some instances justify its own admission. However, it is yet to be held that an alleged co-conspirator's statements alone can be regarded, as they were here, as sufficient evidence to permit, or justify, its own use.

Indeed, the point was well made in **Bourjaily** that there is still a requirement of independent evidence to establish the existence of the conspiracy and there is still a requirement that the defendant's membership therein must be proven by a

preponderance of the evidence, which evidence must corroborate the co-conspirator's statement before the statements can be submitted to the jury for its consideration. Id., **483 U.S., at 181.**

Ultimately counsel-opposite inferentially conceded that the acts and declarations of Jones, Williams, Frank Coyle and Val King made before Hubert Payne entered into an "agreement" (if an agreement resulted from the March 31 discussion) that is what it was with Coyle King and Monaghan were not admissible against Payne. This conclusion follows from the Government's conclusion remarkable contention that:

> The mere fact [that] the government did not argue the entire conspiracy, or all the evidence, or all the inferences cannot ... be interpreted as a change in theory or the abandonment of evidence introduced during its case.

(Government's Response To Defendant Payne's Motion For Judgment Of Acquittal Or A New Trial, p. 8.) As to this position, it is our view that it could not be clearer that the government cannot have it both ways. And, just as surely the

government cannot properly maintain that the evidence showing Coyle and Monaghan's involvement should be admitted on one theory and then make an argument that literally tells the jury such evidence was not relevant to the petitioner's guilt on the specific charges that were being submitted to them.

The above points aside, dealing with the critical facts here, it is at once obvious the admission of Monaghan's testimony that (on March 20) Frank Coyle related that Val King had told him Hubert Payne "would ... handle" Monaghan's money (Tr., pp. 135-136) cannot be justified or defended. Indeed, as argued above (Argument No. I), the admission of this testimony offended Payne's right of confrontation. By way of contrast, what is being specifically contended in this argument is that this evidence cannot be made to fit within the ambit of Rule 801(d)(2)(E).

Of course, it should be noted that what we have here is Monaghan testifying to something Frank Coyle (a double-hearsay declarant) told him Val King (a non-testifying declarant) had said

about Hubert Payne. Obviously if no conspiracy including Hubert Payne was then in existence, then clearly, by definition, at least as to Payne, these statements were not admissible. Next, the statements made by Val King to Monaghan on March 23, 1989 (Tr., 137) fall into the same category. This latter testimony has Val King (the non-testifying declarant) telling Frank Coyle on March 23, 1989 that Hubert Payne, who he described as an associate, "could handle" Monaghan's money (ibid).

Again, the law requires that "[b]efore admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a Court must be satisfied that the statement actually falls within the definition of the Rule. **Bourjaily, 483 U.S. at 175**. Further, where the facts preliminary to admission "are disputed, the offering party must prove them by a preponderance of the evidence" Id., 176.

In this case, as is being conceded, the conversations here involving Val King and Frank Coyle could very well show those

two had a conspiratorial relationship. But this fact can hardly be regarded as furnishing a basis for the admission against Hubert Payne of Val King's repeated hearsay reference to him. However, these references clearly do not qualify for admission of statements as defined in Rule 801(d)(2)(E).

III. EVEN ASSUMING CERTAIN INCONCLUSIVE DISCUSSIONS PARTICIPATED IN BY AN ACCUSED CAN BE SAID TO TRANSLATE INTO AN "AGREEMENT," PROOF THAT A WITHDRAWAL OCCURRED BEFORE THE FIRST OVERT ACT CHARGED IN THE INDICTMENT WAS CONSUMMATED IS A COMPLETE DEFENSE.

Hopefully the Court in assaying the varying aspects of the conversations had by Hubert Payne with Agent Monaghan, Val King and Frank Coyle on March 31, 1989, will reach the most obvious conclusion. The conclusion we contend that more easily describes, or characterizes, these conversations is to say that they were clearly inconclusive discussions that laid a framework for a possible working relationship between the parties. This insuperable fact magnifies the reason for the "overt act"

requirement in the conspiracy law here under consideration. Indeed the requirement addresses the hope that one could not possibly be found guilty on the basis of even a clear-cut agreement, particularly one that is supported only by vague proof as to a basic element of the charged offense -- the case here.

If nothing else, proof of an overt act demonstrates the conspiracy is operative and it cannot be denied "the overt acts alleged in the indictment and proved at trial mark the duration [and in this case the inception] of the conspiracy." **United States v. Davis, 533 F.2d 921, 929 (5th Cir. 1976)**. Also see **United States v. Walls, 577 F. Supp. 772 (N.D. Ga., 1984)**. Also Devitt & Blackmar, Federal Jury Instructions, §27.09 (West, 1977).

The upshot of what is being contended here is that if we credit the contention that the earliest point at which an agreement including Hubert Payne could have been reached was on March 31, 1989, then clearly the facts show Payne withdrew before any

conspiracy including him was formed. Further, it could not be more obvious that Payne's withdrawal was fully endorsed and accepted by the jury as having occurred before April 4. This fact follows from Payne's acquittal on the substantive offense in Count 3 alleged to have occurred on April 12, 1989. This being so the importance of the critical overt act, which was alleged to have occurred on April 4, 1989, really makes our point. This is so because it is the first (or next) overt act alleged to have occurred after March 31, 1989.

Postured then by the fact that the withdrawal evidence clearly shows it occurred before April 4, 1989, when the next alleged overt act took place, the conclusion is inescapable that Payne could not be guilty of being a party to the conspiracy alleged against him.

IV. WHERE THE FACTS, AT LEAST ARGUABLY, SHOW THAT (AT MOST) THE "AGREEMENT" ELEMENT OF A TITLE 18 CONSPIRACY WAS REACHED ON A PARTICULAR DATE (HERE, MARCH 31, 1989) AND THE PROOF SHOWS ONE OF THE PARTIES TO SUCH

"AGREEMENT" WITHDREW BEFORE THE NEXT "OVERT ACT" CHARGED IN THE INDICTMENT WAS ALLEGED TO HAVE OCCURRED (HERE APRIL 4, 1989), THE EVIDENCE WOULD BE INSUFFICIENT TO SUPPORT A CONVICTION OF THE PERSON WHO WITHDREW.

With reference to Hubert Payne's defense of withdrawal, it is clear enough the jury had to have agreed the defense of withdrawal was maintained. Since withdrawal under the facts here could only have occurred when Payne says it did -- that is, on March 31, 1989, shortly after the meeting at the Hopkins Airport, then clearly anything that occurred after this withdrawal occurred would be outside the parameters of Payne's involvement.

So postured, the situation here can be analogized to what occurs when the withdrawal issue turns on the resulting effect of the relationship of the statute of limitations to this defense. What it is that should be analogized, in the context of this case, is the effect of the terminal point imposed by a statute of limitation and an effective withdrawal. This, of course, follows since it could

not be clearer that once the proof of withdrawal is established, any involvement of the person who withdrew would end as to him and he would from that point on be out of the picture. See **United States v. Purvis, 544 F. Supp. 68, 70 (S.D.N.Y. 1982).**

As to Payne, the point would be that any participation by him was complete when he withdrew, as the jury concluded he did. If that occurred (as argued above) before the overt act requirement was met, then it follows he never became a conspirator. Thus, it would follow the guilty of conspiracy verdict would be invalid, which is what we are contending.

Simply put, the focus here has to be on the "overt act" as charged and shown to have occurred on April 4, 1989. Cf., **United States v. Head, 641 F.2d 174, 177 (4th Cir. 1981),** where it was the date of an alleged "overt act" that determined whether the offense charged fell within a statute of limitations. Also see **United States v. Butler, 792 F.2d 1528, 1531-1533 (11th Cir. 1986).** If our analysis is valid, then clearly the

dispositive tenet here mandated that Hubert Payne was entitled to an acquittal if his withdrawal occurred before any overt act charged as having taken place (in furtherance of any agreement he was a party to) was consummated. Support for our thesis, in this regard, is supplied by such cases as **United States v. Karr, 742 F.2d 493, 497 (9th Cir. 1984)**, which specifically held, citing **United States v. Monroe, 552 F.2d 860, 864 (9th Cir. 1977)**, that: "to avoid complicity in a conspiracy, one must withdraw before any overt act is taken in furtherance of the agreement." Also see **United States v. Sarault, 840 F.2d 1479, 1487 (9th Cir. 1988).**

V. WHERE THE ISSUE AS TO WHETHER THERE WAS A WITHDRAWAL FROM A TITLE 18 CONSPIRACY IS RAISED AND IS SUBMITTED TO THE JURY, THE COURT MUST GIVE INSTRUCTIONS THAT WOULD REQUIRE THE JURY TO FIND THE GOVERNMENT DISPROVED THE DEFENSE BEYOND A REASONABLE DOUBT.

Here the Record shows counsel requested the Court to

charge the jury that where (as here) there was evidence of withdrawal "the government has to disprove withdrawal beyond a reasonable doubt." **(Tr., Vol. III, p. 1005.)** This request was summarily denied (ibid).

In taking the position that once the accused satisfies his burden of production on the issue of withdrawal the government has the burden of persuasion on that issue, we do recognize, as did the Appeals Court, that contrary authority does exist in some circuits. Also see **Martin v. Ohio, 480 U.S. 241 (1987).**

At the helm of the cases that have adopted the position here being contended for is **United States v. Read, 658 F.2d 1225 (7th Cir. 1981).** **Read**, in overruling prior cases decided in the Seventh Circuit, specifically held that the government must disprove withdrawal beyond a reasonable doubt. Id., 1236-1237. Other cases that have adopted this thesis are **United States v. Piva, 870 F.2d 753, 756-757 (1st Cir. 1989)**; **United States v. Jannotti, 729 F.2d 213 (1984)** and **United States v. Steele, 685**

F.2d 793, 803-804 (3d Cir. 1982).

The upshot of the above cases is that for the jury to acquit, on the basis of the withdrawal defense, the jury need only have a reasonable doubt on the withdrawal issue. This determination is to be distinguished from a "finding" that the defendant withdrew. The importance of this distinction lies in the compelling fact that under the formulation here being contended for, if the evidence is in equipoise on the issue of withdrawal the accused must be acquitted. Under the other formulation, the one that was submitted to our jury, the opposite verdict was actually mandated. Simply stated the jury was told to convict even if they found it was just as likely that Hubert Payne did in fact withdraw as it was that he did not.

The response of the Court of Appeals to the above contention is encapsuled in the following quote from that Courts Opinion. Here it was stated:

> Defendant Payne essentially is asking this court to reverse the precedent of this circuit in regard to this

> issue. This court places the burden of proof for withdrawal from a conspiracy on the defendant as stated in **United States v. Lash, 937 F.2d 1077, 1083 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 397 (1991).** We see no reason for requesting an en banc panel of this court to reconsider this opinion, as defendant wishes, because it is consistent with the opinions of other circuits. See, e.g., **United States v. Cardall, 885 F.2d 656, 668 n. 22 (10th Cir. 1989); United States v. Walker, 796 F.2d 43, 49 (4th Cir. 1986); United States v. Boyd, 610 F.2d 521, 528 (8th Cir. 1979), *cert. denied*, 444 U.S. 1089 (1980).**

Opinion, Appendix "C", at p. A-46.

In specifically dealing with the obvious conflict between its decision on this burden of proof issue and the contrary decision rendered in other circuits, it is worthy of noting that the Court also rejected, rather summarily the position it had taken on a comparable (burden of proof) issue in **United States v. Guyon, 717 F.2d 1536 (6th Cir. 1983).** Indeed, in *Guyon*, the Sixth Circuit expressly approved the instructions given in that case, which required the Government to "prove beyond a reasonable doubt that the defendant did not act in self-defense," id., 717 F.2d,

at 1541.

With reference to this and related points we incorporate by reference, the detailed arguments made on this point in the "Petition for Rehearing." See Appendix "B", pp. A-3 - A-25.

In our judgment, it is due process which requires this Court to adopt the rationale of those cases which view it as a requirement that the government "must rebut the prima facie showing [of a withdrawal] either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal." **United States v. Steele, 685 F.2d, at 804.**

VI. WHERE THE PROOF FAILS TO SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT THE TRIAL COURT IS REQUIRED TO GRANT A MOTION FOR JUDGMENT OF ACQUITTAL.

The bottom line for which we are contending is that Hubert Payne was not shown beyond a reasonable doubt to have conspired with anyone. This conclusion is fully augmented by the lack of

any proof that Hubert Payne was involved in any of the specific transactions relied on by the government. The question then is: was it reasonable for the jury to credit Frank Coyle's naked, totally uncorroborated and self-serving, testimony that Hubert Payne delivered to him at his building the $25,000.00 check which was the result of the $25,000.00 given Val King by Monaghan.

Now, apart from the credibility problems one would naturally have with Frank Coyle's testimony, the fact that he was so thoroughly impeached to the extent that he was surely makes the jury's acceptance of his testimony most unlikely. Additionally, it is indisputable that Frank Coyle had originally told the agents that Payne was driving "his Jaguar" when he supposedly delivered the check. The upshot of this is, there is nothing in Coyle's evidence that could have provided a sufficient foundation for the jury, in spite of Coyle's total impeachment,[3] to conclude beyond

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[3] *Coyle's impeachment was not limited to the testimony concerning the Jaguar. Indeed, the Record here shows him to have been motivated by reasons other than to tell the truth.*

a reasonable doubt that he was nonetheless worthy of belief.

Postured by the above evidence, it is being contended that even if this evidence is considered in the light most favorable to the government, and even if the government is given the benefit of any and all the reasonable inferences that can arguably be drawn from his testimony, still there is simply no way any reasonable jury should have reached the conclusion beyond a reasonable doubt that Coyle was worthy of belief. Postured by the above analysis what is being argued is that even if this evidence is considered in the light most favorable to the government, and even if the government is given the benefit of any and all the reasonable inferences that can be arguably drawn from his testimony, still there is simply no way any reasonable jury should have reached the conclusion beyond a reasonable doubt that Hubert Payne was guilty of having conspired with anyone. This conclusion is especially cogent here since actual participation is needed as an element of any conspiracy charge. And, proof of a particular

individual's participation as a member of the charged conspiracy can only be established on the basis of his "actions and reactions to the circumstances." **United States v. Barrett, 933 F.2d 355 at 359 (6th Cir. 1991).**

This case also brings into play other critical aspects of this Court's **Bourjaily** decision. To be sure **Bourjaily** recognizes there is a serious distinction between the significance of evidence admitted under Rule 104 (in order to satisfy the requirements of Rule 801[d][2][E]) and evidence required to prove the crime of Conspiracy (18 U.S.C., §371). Aside from the fact that in the former instance, we are only talking about the admission of evidence as prima facie proof of a conspiracy, in the latter instance we are talking about proof sufficient to support a finding of guilt itself. In the first instance, the burden of proof is by the preponderance of the evidence whereas the burden of proof is beyond a reasonable doubt with reference to the conspiracy offense itself.

Now, the government will probably argue that evidence admitted to satisfy the condition precedent requirements of Rule 801(d)(2)(E) can also be regarded as substantive proof of the charges themselves. If this is done, it will at once be obvious that counsel would be ignoring certain realities. This follows because nothing will be cited as providing even an arguable basis for this farfetched position. Additionally, it will verify that counsel either did not read the **Bourjaily** case, or (if he did) he simply failed to understand it or was confounded by it.

Here, it is worth repeating that **Bourjaily** made the very significant point that "the evidentiary standard [for the admission of evidence under 801(d)(2)(E)] is unrelated to the burden of proof on the substantive issues" (**id., at p. 175**). Simply put, the critical point here being contended for was well made in **Bourjaily** when the Court stated, and this is worth repeating, "the evidentiary standard for [Rule 801(d)(2)(E)] is unrelated to the burden of proof on the substantive issues" (ibid). (Emphasis supplied.)

So postured, even if the evidentiary standard for the admission of the challenged 801(d)(2)(E) evidence was properly met, it is a non sequitur to argue (because it does not follow) that Hubert Payne was therefore proven guilty of the charged conspiracy offense beyond a reasonable doubt. Again, the point to be made is that for a considerable quantity of the evidence here being assailed to be admissible, under Rule 801(d)(2)(E), the proof must show the existence of a conspiracy that included the declarant (Val King) and Hubert Payne, the party against whom the evidence is admitted. With reference to the Title 18 Conspiracy offense, the proof required the establishment of that relationship beyond a reasonable doubt. See, **United States v. Gill, 604 U.S. 546 (7th Cir. 1979)** and **United States v. Trowery, 542 F.2d 623 (3d Cir. 1976)**. In Gill, the Court emphasized the precise critical point here being contended for. Simply put, it was held that "the co-conspirator exception to the hearsay rule ... is merely a rule of evidence founded, to some extent, on the concepts of agency law,"

id., 549 (citing **United States v. Trowery, supra, p. 626**).

A further aspect of the distinction (between the admission of statements under Rule 801[d][2][E] and the quantum of proof required for a conviction) is the insuperable fact that a member of the charged conspiracy (here, Frank Coyle and Val King) may not make another person a member simply by saying so. In a nutshell, Hubert Payne cannot be said to have been proven to be guilty simply because he was said by Val King to have been interested in dealing with Monaghan.

Distilled, what we are saying is that while the existence of a conspiracy, in an evidentiary sense, can include declarations admitted under Rule 801[d][2][E] (along with other evidence showing the statements and acts of all the alleged conspirators) "a particular defendant's membership in ... [such] conspiracy, if any, must be based on evidence limited to that defendant," **United States v. Ortiz, 883 F.2d 515, 521 (7th Cir. 1989)**. This being so, it follows that the Court is required to review the sufficiency

of the evidence with reference to Hubert Payne's conviction solely on the basis "of what he did or said" (ibid). See **United States v. Brown, 335 F.2d 170, 172 (2d Cir. 1964)** and **United States v. Esparza, 876 F.2d 1390, 1393 (9th Cir. 1989)**.

The cogency of the points here being made becomes even more manifest when one realizes that if a jury is only permitted to find the membership/participation elements on the basis of the defendant's own actions and words, then clearly the fact that Payne himself was not shown to have done anything prior, or subsequent, to the March 31, 1989 meeting inexorably dictates the required position. In a nutshell this Court should credit the particular arguments made in this segment of our Petition.

VII. ONE SENTENCED UNDER THE GUIDELINES CANNOT BE DENIED THE "ACCEPTANCE OF RESPONSIBILITY" CREDIT SIMPLY BECAUSE OF HIS TRIAL TESTIMONY THAT THE THINGS HE DID AND SAID DID NOT QUALIFY HIM FOR CONVICTION, WHERE IN THE WAKE OF THIS TESTIMONY HE IS ACQUITTED OF ONE OF THE TWO CHARGES HE FACED AT TRIAL.

Here we are contending the trial Court erred by improperly denying Hubert Payne credit for accepting responsibility and not awarding him the two-level sentence reduction provided for under U.S.S.G. §3E1.1. In our view the conclusion one gets from the Court's expressed comments in denying this adjustment is that the Court somehow convinced herself the "acceptance of responsibility" award could not be given to one who testified in his own trial. Here our reference is to the Court's express reference to the segment of the commentary to this section, which reads that it may be awarded, e.g., "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt ...." (**Sentencing Transcript**, p. 26.) The clear message sent by this statement is that Payne was not disqualified from any entitlement to this consideration because he testifies in his own defense.

Aside from the fact that surely the law cannot be that Payne can be punished because he raises an affirmative defense to the charges against him and testifies his conduct was not criminal, the

trial court's expressed notion ignores the fact that clearly Payne never testified to anything that was not ultimately validated by the jury's obvious acceptance of his version of the events in which he was personally involved. Clearly then, as bad and as unfair as these Guidelines are, surely this Court will not endorse an interpretation of them that would affirmatively penalize one who offers a defense, even a technical one, to the government's charges. If such is not to be the case, then this is surely the case in which that point should be made loud and clear.

VIII. WHERE THE FACTS BEARING ON "THE OFFENSE OF CONVICTION" CLEARLY SHOW A DEFENDANT'S PARTICIPATION MADE HIM SUBSTANTIALLY LESS CULPABLE AND (AT WORSE) ONLY BARELY CULPABLE, A FAILURE TO DOWNWARDLY ADJUST THE REQUIRED SENTENCE MUST BE REGARDED AS CLEARLY ERRONEOUS.

The position here being taken is that the District Court's refusal to award the mitigation adjustment sought by Hubert Payne was clearly erroneous. This follows here because when one looks

at the very slight role Hubert Payne played, even if it can be deemed criminal, when it is compared with the roles of those he must then be regarded as having conspired with (i.e., Frank Coyle and Val King), surely this Court, on the basis of its consideration of "the entire evidence ... [, will be] left with the definite and firm conviction that a mistake has been committed." **United States v. U.S. Gypsum Co.**, 333 U.S. 364, 395 (1948).

This follows because, once the Court credits the stated purpose for the downward departure required by U.S.S.G., §3B1.2, this conclusion is really inescapable. Here our reference is to the fact that the commentary to this Guideline expressly provides that its aim was to benefit a defendant "who plays a part in committing the offense that makes him substantially less culpable than the average participant" (ibid).

Obviously Payne's asserted participation must be properly viewed by comparing his role with the participation of Coyle and Val King. This will show he was substantially less culpable than

they were. Id., Comment (n. 1). On the other hand, it is recognized that the "minimal" designation was not intended to be frequently used. Still it is a fact that Payne, if culpable at all, should only have been regarded as a minimal participant -- as was specifically contended to be the case in the District Court.

The starting point here is with the "elements of the offense of conviction," which controls whether an adjustment is warranted. Here the offense of conviction is only that of conspiracy (a Title 18 conspiracy -- not a Title 21 conspiracy). Further, Payne was acquitted of the only substantive offense with which he was charged. His co-defendant at the trial was convicted of the charged substantive offense and his other alleged co-conspirators (Frank Coyle, Ralph Jones and Ferris Williams) not only admitted to their guilt, but also to charges far more extensive than the one charge this petitioner was convicted of.

As additional support for our contention, that the ruling denying Hubert Payne the designation of minimal participant, we

rely on the cogent expression of our position in **United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989)**. There the Fourth Circuit noted that in deciding whether a downward adjustment for a "role in the offense" is warranted, the determination is made "by measuring each participants indicated acts and relative culpability against the elements of the offense of conviction." Id., 216 (Emphasis supplied). Had these factors been appropriately dealt with here, then clearly Hubert Payne's sentence would surely have been different.

CONCLUSION

For all the various reasons argued above, this cause should be reviewed.

Respectfully submitted,

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